Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In the Supreme Court of the United States

PIKE COUNTY JOINT VOCATIONAL SCHOOL DISTRICT, ET AL.,

Petitioners,

v.

MISTY KNISLEY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit has ignored this Court's remand herein and its mandate in *Safford Unified School Dist. # 1, et al. v. Redding*, 129 S.Ct. 2633 (2009) and in so doing has established contrary precedent.

II. Whether it is unconstitutional for a school administrator to search a classroom of nursing students to recover stolen cash, a gift card, and a credit card with the reasonable belief that the theft occurred during that continuing class period, by one or more persons still in the classroom.

III. Whether the Sixth Circuit departed from established principles of qualified immunity in holding that school administrators may be liable in a damages lawsuit under 42 U.S.C. §1983 for the scope of a search conducted of a classroom of nursing students for stolen cash, a gift card, and a credit card.

IV. Whether the Sixth Circuit's decision conflicts with decisions of the Seventh, Ninth, and Eleventh Circuits regarding the reasonableness of the inception and scope of the search, and the application of established principles of qualified immunity.

LIST OF PARTIES

The Parties to this case are Pike County Joint Vocational School District, Vern Riffe Career Technology Center aka Pike County Career Technology Center, Toni Fout in her individual and official capacity, Keith Smith in his individual and official capacity, Wendy Harper in her individual and official capacity, Cheryl Shaw in her individual and official capacity, and Lorna Music in her individual and official capacity, all appearing as Petitioners. Mr. Smith is the Director/Building Principal, Toni Fout is a nurse employed as a diversified health occupations senior instructor, Cheryl Shaw is an intervention specialist, Lorna Music is a guidance counselor and Wendy Harper is a nurse and a diversified health occupations instructor.

Respondents are eleven (11) female nursing students: Misty Knisley, Betty Hall as parent and next friend of Rose Peters, a minor, Patricia Schieser as parent and next friend of Brittany Schieser, a minor, Betty Grandstaff as parent and next friend of Heather McCloud, a minor, Teresa Bryant as guardian and next friend of Jennifer Ann Hardin, a minor, Angela Kay Sowers as parent and next friend of Kera Scaggs, a minor, Sandra Stevens as parent and next friend of Dana Rhinesmith, a minor, James Alexander as parent and next friend of Megan Alexander, a minor, Angela Gilbert as guardian and next friend of Heather Gilbert, a minor, Freda Carol Snively as guardian and next friend of Ashley Samaniego, a minor, and Barbara Hoffer as guardian and next friend of Brittany Hoffer, a minor.

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INTRODUCTION

In a decision that conflicts with relevant decisions of this Court, and other Circuits, the Sixth Circuit has not only unreasonably restricted the scope of a reasonable search by school administrators, but has prohibited a search of a group or classroom of students, despite the fact that a theft has taken place in that classroom, and none of the students therein have left the room. In addition, the Sixth Circuit has denied the school administrators qualified immunity despite no prior notice that the inception and scope of their search was unreasonable.

The Sixth Circuit has now issued two (2) decisions in this case, both of which conflict with the decisions and mandate of this Court. The Sixth Circuit's decision in *Misty Knisley, et al. v. Pike County Joint Vocational School District, et al.*, No. 08-3082 (December 8, 2008)("*Knisley* I") was vacated by this Court on June 29, 2009 with a remand for further consideration in light of *Safford Unified Dist. # 1 v. Redding*, 129 S.Ct. 2633 (2009). On remand, the Sixth Circuit ignored and misapplied this Court's mandate in *Safford*, and simply reprinted its decision in *Knisley* I. See, *Misty Knisley, et al. v. Pike County Joint Vocational School District, et al.*, No. 08-3082 (6th Cir. May 14, 2010)(Appendix A "Knisley II").

The *Safford* case involved the search of a thirteen (13) year old student for possession of prescription drugs, said search being deemed a violation of constitutional rights unjustified at its inception. The scope of the search was similar to the case herein, as Ms. Redding was asked to pull and shake her bra band as well as the elastic of her underwear, without her

being touched by anyone. Just as in the case herein, the Ninth Circuit denied qualified immunity to the administrators, finding they were on notice that Ms. Redding's rights with regard to the inception of the search were clearly established. In its decision in *Safford*, supra, this Court specifically recognized that there had been a lack of "clearly established" Court precedent regarding school searches, and concluded that qualified immunity was warranted. *Safford*, supra at 2644. The Sixth Circuit in *Knisley* II has disregarded and given short shrift to this Court's mandate in *Safford*, as well as this Court's mandate/remand herein, which vacated the Sixth Circuit's prior decision.

The case herein presents this Court with an opportunity to consider the reasonableness of the inception and scope of a search of a group/classroom of students wherein a theft has been committed, and none of the students has left the room. The case herein has similar, overlapping important issues with the *Safford* case, allowing this Court to provide additional guidance to school officials across the country who are becoming understandably alarmed. Herein, not only were the school administrators denied immunity, but were expected to be on notice that they could not search a group/classroom of students, even though the theft occurred during the class, and no student had left the room. Every student in the class was a suspect. Such a precedent places student thieves on notice that they should commit their crimes amongst a group of students, or in a full classroom, as school administrators are not allowed to search the classroom or group of students. No school administrator will be willing to subject themselves to potential liability for searching a group or classroom of

students, having now been placed on notice that they will not be entitled to qualified immunity. The Sixth Circuit has now expanded this Court's meaning of "individualized suspicion" to the extent that no group or classroom of students can be searched.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit entitled *Knisley, et al. v. Pike County Joint Vocational Sch. Dist., et al.*, 604 F.3d 977 (6th Cir., May 14, 2010) *Knisley* II is attached as Appendix A.

The opinion of the Supreme Court of the United States vacating and remanding *Knisley* I is *Knisley, et al. v. Pike County Joint Vocational Sch. Dist., et al.*, 129 S.Ct. 2893 (2009), attached as Appendix B.

The opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full-text publication, entitled *Misty Knisley, et al. v. Pike County Joint Vocational School District, Vern Riffe Career Technology Center, aka Pike County Career Technology Center, Toni Fout, Keith Smith, Wendy Harper, Cheryl Shaw, Lorna Music*, Case No. 08-3082, December 8, 2008 (6th Cir.), Knisley I, attached as Appendix C.

The opinion and order of the United States District Court, Southern District of Ohio, Eastern Division is unreported, entitled *Misty Knisley, et al. v. Pike County Joint Vocational School District, et al.*, Case No. 2:06-cv-0097, December 18, 2007 (Dist. Ct. S.D. Ohio), see Appendix D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254 and Supreme Court Rules 10(a) and 10(c), as the United States Court of Appeals for the Sixth Circuit has again entered a decision in conflict with the decisions of other United States Courts of Appeal on the same important matter, and has decided an important federal question in conflict with the remand and relevant decisions of this Court.

The Sixth Circuit entered its Order on remand on May 14, 2010.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 42 United States Code, Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District

of Columbia shall be considered to be a statute of the District of Columbia.

The Fourth Amendment to the United States Constitution.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 7, 2006 Respondents, nine (9) in total, filed their Complaint against Petitioners stemming from a search for stolen money and gift/credit cards, conducted at the Pike County Joint Vocational School District on or about January 20, 2006. The complaint was later amended to add two (2) additional Respondents. In their response to the Motion for Summary Judgment in the trial court, Respondents agreed and urged dismissal of their class action claims, all retaliation claims (Count III.) and all claims for punitive damages, as well as a dismissal of Petitioner Music. Thus, the only Counts reviewed by the District Court and the Sixth Circuit on appeal were Counts I. and II., based upon 42 U.S.C. §1983 and the Ohio Constitution which mirrors same. The District Court denied Petitioners' Motion for Summary Judgment finding that the individual Petitioners were not entitled to qualified immunity. The Sixth Circuit affirmed on December 8, 2008.

On March 5, 2009 Petitioners herein filed their first Petition for Writ of Certiorari. On June 29, 2009, the Supreme Court of the United States granted the Petition for Writ of Certiorari and vacated the decision of the Sixth Circuit in *Knisley* I. This Court remanded this case to the Sixth Circuit for further consideration in light of *Safford Unified School Dist. # 1 v. Redding*, 129 S.Ct. 2633 (2009). After briefing by all parties on remand, the Sixth Circuit reprinted its decision in *Knisley* I, and added two (2) new paragraphs at the end, basically ignoring/misinterpreting this Court's mandate in *Safford*. (Appendix A at pages 7 - 8.)

The Vern Riffe Career Technology Center, also known as Pike County Career Technology Center is in the Pike County Ohio Joint Vocational School District, and provides vocational training for high school students. As such, like many public schools, it regularly deals with student discipline, as well as student crimes involving weapons, drugs, theft, and truancy. This case involves the training of future professionals, approximate ages sixteen (16) - eighteen (18), studying to be nurses. Education is being provided in all of the beginning health care skills one would need for any health care occupation such as nurse assistant, medical assistant, lab assistant, physical therapy assistant, vital signs, infection control, medical terminology, anatomy and physiology. The students were also being taught the legal aspects of the profession, including honesty in the workplace, ethical situations, privacy concerning medical records, HIPPA laws as well as proper conduct in hospitals, nursing homes, and in the private homes of patients. It was not only important for the Respondents to learn the requirements of their nursing profession, but also to fully understand about honesty in the workplace,

and the ethical considerations required by the profession.

As with all public schools, the Pike County Joint Vocational School District had a search policy. The Student Handbook and search policy were effective on January 20, 2006. The policy is legally and properly drafted, and indicates that any search shall be conducted in accordance with the Ohio Revised Code and Court rulings. In their depositions, all eleven (11) Respondents admitted to having received a copy of this policy in the Student Handbook, and in fact, having been taught the policy in review classes conducted by Petitioner Harper at the start of the 2005 - 2006 school year. In fact, each Respondent was tested on the information in the Student Handbook, including a question as to whether or not they could be searched without their consent or permission. All eleven (11) Respondents had prior notice that they could be searched in accordance with law prior to January 20, 2006.

On January 20, 2006, the eleven (11) named Respondents were female students in the Pike County Joint Vocational School District, more specifically, receiving nursing training in the DHO lab at the Vern Riffe Career Technology Center, being taught by Petitioner Harper. Prior to the start of the lab, the students would change into their scrubs in an adjoining typical open locker room. Throughout the class, it was customary for the students to place their purses on their tables in the classroom where they remained for their course work. On January 20, 2006, approximately one (1) - two (2) hours into the class, two (2) of the Respondents, Amber Montgomery and Heather Gilbert, noticed that there were items missing

from their purses, consisting of $80.00 - $90.00 in cash from Montgomery's purse, and $5.00 in cash, a credit card and two (2) gift cards from Gilbert's purse. They reported the theft to their teacher, Wendy Harper, as well as discussing it with a couple of fellow students. Ms. Harper reported it to the Building Director (Principal) Petitioner Smith, who came to the classroom, and conducted a search pursuant to the District's search policy.

Pursuant to the policy in searching for stolen property, Petitioner Smith authorized and directed the search of the students in the classroom. It should be noted that none of the students had left the classroom, Respondents Montgomery and Gilbert were sure their stolen items were in their purses at the start of class, and therefore all students in the classroom were reasonable suspects. Each students' purses, books, shoes, socks and pockets were searched in the first aid room. Thereafter, each student's locker was searched. After a few students were searched, one student, Stephanie Jones, advised Director Smith that he needed to search further than what he was doing as the girl she thought had taken the items had gone to the restroom and it might be hidden on her person, in her bra and/or panties. As a result of this reliable information, Mr. Smith changed the scope of the search to include that each student go into the restroom with Teacher/School Nurse Toni Fout, unfasten their bra and shake it out underneath their scrub top, and pull their scrub pants down to the top of their knees. Each of the Respondents individually did so in the presence of only Ms. Fout, in the restroom, said procedure taking only a couple of minutes. With the exception of allegedly touching one student's scrub top and helping a student re-snap her bra, Ms. Fout

did not touch any of the students' bodies. A couple of the students were not wearing underwear and/or were wearing thongs, otherwise all of them were wearing bras and/or regular underwear/panties.

None of the Respondents objected during the search. None asked to call their parents, none cried or exhibited signs of being upset. In discovery, none of the Respondents claimed to be physically or emotionally injured by the search, only some of them claiming to be embarrassed. The stolen cash and gift card were never found, however, Respondent Gilbert did find the missing credit card in her car after the search.

After the search was completed, the students came back into the lab, took their seats, and Nurse Fout explained to them that as their senior instructor she would be taking them into nursing homes and to hospitals. She indicated that it would be very difficult for a dishonest person, or one who steals, to maintain a position in healthcare.

REASONS FOR ALLOWANCE OF THE WRIT

1. **Whether the Sixth Circuit has ignored this Court's remand herein and mandate in *Safford Unified School Dist. # 1, et al. v. Redding*, 129 S.Ct. 2633 (2009) and in so doing has established contrary precedent.**

The Sixth Circuit decision directly conflicts with relevant decisions of this Court, the most recent being this Court's decision in *Safford Unified School Dist. # 1, et al. v. Redding*, 129 S.Ct. 2633 (2009). The Sixth Circuit's decision also conflicts with this Court's

pronouncements regarding "individualized suspicion" in *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls*, 536 U.S. 822 (2002), and *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).

After remand from this Court, the Sixth Circuit gave short shrift to this Court's mandate, and basically reprinted its decision in *Knisley* I, and in two (2) new paragraphs brushed aside this Court's mandate in *Safford*, claiming the Sixth Circuit's prior decision in *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598 (6th Cir. 2005) controlled.

When this Court previously granted Petitioners Writ of Certiorari and "vacated" the Sixth Circuit's decision in *Knisley* I, it was fully aware of the Sixth Circuit's reliance upon its prior case precedent in *Beard*. Yet, being fully aware of the Sixth Circuit's prior precedent in *Beard*, this Court "vacated" the Sixth Circuit's decision in *Knisley* I. The actions of this Court were a clear signal to the Sixth Circuit that its decision in *Beard* did not control, and this Court's decision in *Safford* had far reaching application.

In *Safford*, supra, this Court clarified the application of immunity in school search cases, loud and clear. This Court expressly acknowledged that since its decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the lower courts have reached divergent conclusions regarding how the *T.L.O.* standard applies to such searches. *Safford*, at 2643. In discussing prior cases from the Ninth, Sixth and Eleventh Circuits, this Court stated at page 2644:

> ...That said, however, the cases viewing school strip searches differently from the way we see

> them are numerous enough with well-reasoned majority and dissenting opinions, to counsel doubt that we were sufficiently clear in the prior statement of law. We conclude that qualified immunity is warranted.

This profound statement was an acknowledgment that the law governing school searches of this type has not been sufficiently clear in order to place reasonable governmental officials on notice that their actions would be in violation of clearly established rights. This Court acknowledged that the standards set forth in the *T.L.O.* case were not sufficiently clear to allow the courts in this country to consistently apply the law to school search cases, resulting in "...The differences of opinion from our own are substantial enough to require immunity for the school officials in this case." *Id.* at 2644. In *Safford* this Court acknowledged that if the judiciary in this country had such differences of opinion in the application of the *T.L.O.* standard, then certainly a school administrator could not be on notice that his/her actions were violating clearly established constitutional rights.

It is Petitioners' belief that by granting their prior Petition for Writ of Certiorari and by vacating and remanding Knisley I, this Court intended to send notice to the Sixth Circuit that immunity should apply herein. This Court could have required briefs and/or oral argument. Instead, it chose to vacate and remand.

The Sixth Circuit totally ignored this Court's new test stated in *Safford*, supra, at 2643 as follows:

> We do mean, though, to make it clear that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicion.

This was a new standard and a new test. It is not found in the *Beard* decision, erroneously twice relied upon by the Sixth Circuit. This Court, in granting qualified immunity in *Safford*, acknowledged that it was clarifying *T.L.O.* with regard to a search resorting to underwear, there now must be a reasonable suspicion of danger, or an indication that the evidence has been hidden in the underwear. On remand the Sixth Circuit did not even mention this new test, or apply it to the facts herein. Instead, the Sixth Circuit simply relied upon its prior decision in *Beard*, and pushed aside this Court's decision in *Safford*.

The differences between the facts in *Beard*, and the case herein are clearly significant enough that the Petitioners should have been granted qualified immunity, especially when this Court's immunity mandate and new test set forth in *Safford* are properly applied and followed.

2. **Whether it is unconstitutional for a school administrator to search a classroom of nursing students to recover stolen cash, a gift card, and a credit card with the reasonable belief that the theft occurred during that continuing class period, by one or more persons still in the classroom.**

The Sixth Circuit has now twice expanded, and misapplied the term "individualized suspicion" in a way that directly conflicts with relevant decisions of this Court. This misapplication has now placed school administrators on notice that it is unconstitutional for them to search a group of students, unless they have individualized suspicion of one of the students, even though they have a reasonable suspicion that the culprit is a person in the group or classroom. Furthermore, the Sixth Circuit's misapplication has sent notice to school administrators that they should not take the risk of searching a group of students at all, as they will likely be subjected to suit, and potential liability for damages, without the protection of qualified immunity. The Sixth Circuit's decision herein will have a chilling effect on school administrators across the country, who now will be forced to turn their heads when a crime occurs among a contained classroom and group of students.

Twenty-four (24) years ago this Court decided *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and rejected efforts to impose a warrant requirement and probable cause standard on searches by school officials. This Court recognized that school administrators who were responsible for maintaining safe and orderly learning environments needed more flexibility than the probable cause standard generally permits under the

Fourth Amendment. The Court decided to provide this flexibility by adopting a reasonable suspicion standard that deferred to the judgment of school personnel in making disciplinary decisions about students suspected of violating school rules or the law.

In the past twenty-four (24) years, the lower courts' application of the *T.L.O.* standard has led to confusion, not only among judges, but also among educators and school administrators. Clarity is desperately needed as demonstrated by the Sixth Circuit decision herein.

It should be no surprise that crime of all types continues in schools. The National Center for Education Statistics (NCES) issues annual publications produced in conjunction with the Institute of Education Sciences (IES), in the U.S. Department of Education, and the Bureau of Justice Statistics (BJS) in the U.S. Department of Justice. In the 10th Annual Report entitled "Indicators of School Crime and Safety: 2007," NCES 2008 - 021, December 2007, the key findings are startling. In 2005 alone, among students ages twelve (12) - eighteen (18), there were 868,100 thefts, with thefts including purse snatching, pick-pocketing, and all attempted and completed thefts except motor vehicle thefts. Theft did not include robbery in which threat or use of force was involved. In the 2005 - 2006 school year, eighty-six (86) percent of public schools reported one or more serious violent incidents, violent incidents, thefts of items valued at $10.00 or greater, or other crimes had occurred at their school, amounting to an estimated 2.2 million crimes, which translated into a rate of forty-six (46) crimes per thousand students enrolled in 2005 - 2006. Students ages twelve (12) - eighteen (18) were generally more likely to be victims of theft at school than away from

school. In 2005, thirty-three (33) thefts per one thousand students occurred at school and twenty-three (23) thefts per one thousand students away from school.[1]

Since *T.L.O.* this Court has reviewed other student search cases. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie v. Earls,* 536 U.S. 822 (2002), and *Vernonia Sch. Dist., 47J v. Acton,* 515 U.S. 646 (1995). Those cases discussed "individualized suspicion" however, the Sixth Circuit has now expanded and misapplied that concept.

In both cases, this Court upheld the suspicionless drug testing of athletes as constitutional. In so doing, this Court specifically stated:

> "...The school search we approved in *T.L.O.* while not based on probable cause *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, "the Fourth Amendment imposes no irreducible requirement of such suspicion," Id., at 342, n.8 (quoting *United States v. Martinez - Fuerte*, 428 U.S. 543, 560 - 561, 49 L.Ed.2d 1116, 96 S.Ct. 3074 (1976)."..."

Vernonia, supra, at 652. In *Earls*, this Court stated at page 829:

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[1] Of course, this is not to mention the statistics regarding school associated violent deaths, other non-fatal crimes at school, violent crimes, fights, bullying, classroom disorder, weapons, teacher injury, drugs and alcohol.

> "...In certain limited circumstances, the government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion."...

Thus, this Court has made it clear that the Fourth Amendment imposes no irreducible requirement of individualized suspicion in a school search setting. To the contrary, the Sixth Circuit has now twice made individualized suspicion a requirement.

This Court made it clear in both *Vernonia* and *Earls*:

> "Fourth Amendment rights...are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the school's custodial and tutelary responsibility for children." *Vernonia*, 515 U.S., at 656, 115 S.Ct. 2386. In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing."

Earls, 536 U.S. at 829 - 830. This Court pronounced that when the government acts as a guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. *Earls*, 536 U.S. at 830.

The Sixth Circuit's "slippery slope" began with its decision in *Beard v. Whitmore Lake School District*, 402 F.3d 598 (6th Cir. 2005), upon which it relied solely to twice deny qualified immunity herein. *Beard*

involved a student in gym class reporting to her teacher that her prom money had been stolen during the class. Twenty (20) male students were searched individually in the boy's shower room, with the male students lowering their pants and underwear and removing their shirts, by two (2) male teachers. Two (2) female teachers took approximately five (5) female students into the girl's locker room where the female students pulled up their shirts and pulled down their pants without removing their underwear, while standing in a circle in front of each other. The Sixth Circuit attempted to apply the three (3) factors used by this Court in *Vernonia*, and found that the searches were performed in the absence of individualized suspicion, and therefore were unconstitutional. Id. at 603 - 06.

Even though the scope of the search was not as intrusive herein, the Sixth Circuit found that "individualized suspicion" denotes that a particular person is suspected of wrongdoing rather than a group of persons who happen to be in the same place. (See *Knisley* I, Appendix C, at page 5.) The Sixth Circuit has ignored the distinct possibility, which occurs numerous times everyday across this country, that a crime or a theft occurs at school in a classroom full of students, or in a group of students. Administrators must have the ability to search that entire group of students, based upon the reasonable suspicion that the culprit is present therein. To take that ability away from school administrators will result in giving student thieves a "free pass" when committing theft amongst a group, or in a full classroom. The Sixth Circuit focused on testimony of Director Smith, wherein he was specifically asked if he had any reason to suspect one student over another, and so doing,

totally ignored the testimony of all of the involved administrators that every person in the class was a reasonable suspect, because the victims were adamant that the money and the gift card/credit card were in their purses at the start of the class, and the theft occurred during the class, and none of their classmates had left the room.[2]

If the Sixth Circuit's extremely narrow interpretation of this Court's prior pronouncements on the application of "individualized suspicion" is allowed to stand, every school administrator will have been placed on notice that it is unconstitutional to search any group or classroom of students, regardless of the nature of the crime, or the reasonable certainty that the culprit remains in that classroom or group. Herein, the Sixth Circuit left no room for exception when it stated at page 5 of the Knisley I Opinion:

> "...Furthermore, an "individualized suspicion" denotes that a particular person is suspected of wrongdoing rather than a group of persons who happen to be in the same place. See *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979)..."

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[2] The Sixth Circuit cited testimony that there were two (2) or three (3) other students that entered the classroom during the class to take photos for the yearbook. However, the entire testimony on that issue was that none of the Respondents observed those two (2) or three (3) persons doing anything inappropriate, and they were only in their room for a few minutes. Furthermore, it defies reasonable common sense to allow their minimal presence to render meaningless the reasonable suspicion of all the other students in the classroom.

It is surprising that the Sixth Circuit relied upon the *Ybarra* case, supra, for its meaning of "individualized suspicion." *Ybarra* has absolutely nothing to do with a school, or students, or the standard set forth by this Court in *T.L.O.* for student searches. *Ybarra* involves the search by police officers of a person at a public tavern, the application of the *Terry* doctrine and probable cause. The Sixth Circuit's reliance upon the *Ybarra* case for setting its standard of "individualized suspicion" directly flies in the face of this Court's fundamental concepts regarding school searches, and the "reasonable basis" standard which replaced "probable cause," after the recognition of the need to balance the State's compelling interest against an individual's constitutional rights. *Ybarra* has absolutely no proper application at all.

The Sixth Circuit concluded by holding that unless a school administrator has "reason to suspect that any particular student was responsible for the alleged theft," the search is unconstitutional. The Sixth Circuit has ignored the reality that when a theft occurs in a closed group or classroom, the school administrator will almost never have reason to suspect a particular student, but will definitely have reasonable suspicion that the culprit is included in the group or classroom. The result will be that a search can never be conducted of a group or a classroom of students. This is an unacceptable mandate which severely jeopardizes all aspects of the goals of our educators to preserve the learning environment and protect the safety of students.

3. Whether the Sixth Circuit departed from established principles of qualified immunity in holding that school administrators may be liable in a damages lawsuit under 42 U.S.C. §1983 for the scope of a search conducted of a classroom of nursing students for stolen cash, a gift card, and a credit card.

In the Knisley I decision, reprinted verbatim in Knisley II, the Sixth Circuit made short shrift of Petitioners' qualified immunity argument. At page 6 of the Opinion, the Court briefly acknowledged the existence of the doctrine of qualified immunity, and acknowledged that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Thereafter, in the last paragraph of their Knisley I decision, the Sixth Circuit "boot strapped" its prior erroneous finding that "individualized suspicion" cannot occur when an entire group or classroom of students is involved, into a conclusion that because of the *Beard* case, the Petitioners were on notice that it would be unconstitutional to search a group or classroom of students. The Court chose to disregard the differences between the search in *Beard*, and the search herein, and basically concluded that they were "materially similar" and therefore, Petitioners had fair warning that their actions were unconstitutional.

In *Beard*, supra, the Sixth Circuit made it clear that at the time the search had occurred therein, the law regarding the reasonableness of a strip search was not clearly established. As a result, the Sixth Circuit reversed the District Court and applied qualified

immunity even though it had found that the searches were unconstitutional. In *Beard*, at 402 F.3d at 607 the Court stated:

> At the time of the search at issue, the prior law involving strip searches of students did not clearly establish that the defendants' actions in this case were unconstitutional. Supreme Court cases on school searches, *T.L.O.* and *Vernonia*, set forth basic principles of law relating to school searches, yet do not offer the guidance necessary to conclude the officials here were, or should have been, on notice that the searches performed in this case were unreasonable. ...

The Sixth Circuit went on to state that its own cases, involving student strip searches, "also do not clearly establish the unconstitutionality of the searches in the instant case." Id., at 607 - 608.

Thus, after *Beard* was decided, school administrators, sometimes on a moments notice, had to decide whether their search was going to be similar enough to the *Beard* search to be unconstitutional, or if it was going to differ enough so that they would be protected by qualified immunity, and not subject to damages. A very difficult predicament for any school administrator, trying in good faith to do their job, and dealing with the myriad of crimes that occur in schools these days. However, it almost goes without saying that the facts in *Beard* did not cover all search situations, nor could they.

This Court's initial test for reasonable school searches set forth in *T.L.O.* was simple and direct in its statement however, has proven to be extremely

difficult in its application, as this Court has recognized in Safford, supra. Most school search cases are not factually simple, nor "black and white" when an administrator, in good faith, makes the decision to search. When such cases are scrutinized in hindsight by Judges, under the requirements of the *T.L.O.* test, they can typically be decided either way, depending upon the liberal or conservative preferences of the Judges deciding the cases. As such, it is nearly impossible for a school administrator to guess correctly as to the propriety of his/her search decision.

The Sixth Circuit chose to disregard "material" differences between the facts in the *Beard* case, and the case herein. The following significant differences appear:

Beard Case	*Knisley* Case
20 boys searched together in the shower room.	17 girls each searched separately in the bathroom.
Each boy required to remove his pants.	Each girl was not required to remove her scrubs, only pull them down to her knees.
Each boy required to remove his shirt.	Each girl did not remove her scrub top at all, only unsnapped her bra, and shook it out underneath her scrub top.
Each boy required to remove his underwear.	Each girl not required to remove her underwear.

5 girls searched in the locker room in front of each other while standing in a circle.	Each girl searched separately, alone, with a female nurse in the bathroom with the door closed.
Each girl required to pull up her shirt.	Each girl not required to pull up her scrub top, only unsnap her bra and shake it out underneath her scrub top without exposing her upper torso.
Each girl required to pull down her pants.	Each girl only required to pull her scrub pants down to the top of her thighs.
There was an absence of individualized suspicion.	Because everyone was sure the theft occurred during that class, and none of the students had left the room, there was individualized suspicion of the entire group of students.

In *Beard*, the Sixth Circuit strongly recognized that at the time the searches were conducted, "the Sixth Circuit cases thus simply do not "truly compel" the conclusion that the searches in this case were not reasonable." *Supra*, at p. 606. Upon analysis, the facts of the *Beard* case did not place Defendants herein on notice that requiring students to shake out a bra under a scrub top, and pull down scrub pants to the knees would be unreasonable and/or unconstitutional,

especially when done individually, in a bathroom, in front of a female school nurse. The *Beard* Court recognized that the Supreme Court "did little to explain how the factors should be applied in the wide variety of factual circumstances facing school officials today." *Supra*, at p. 607. The *Beard* decision only set forth notice with regard to the specifics of the search therein, which are obviously different than the case at bar in critical ways. As the *Beard* Court recognized:

> In order for the law to be clearly established as of the date of the incident, the law must "truly compel" (not just suggest or allow or raise a question about), the conclusion... that what defendant is doing violates federal law in these circumstances." (citations omitted.)

Id., at p. 607. The *Beard* Court could only address the facts before it, and thus could not set forth a future set of rules for school officials to follow in all search scenarios. Because they are significantly different than the facts of the case herein, the *Beard* case did not clearly establish that the actions of the Defendants herein would be unconstitutional. The words "truly compel" are strong, definitive words that leave no room for uncertainty. Until a sufficient number and variety of school search cases are decided, the cases that currently exist simply do not fairly place public officials on notice of the unconstitutional parameters of every search which they may confront. The factual situations are too complex and varying. For example, there is not one prior case that holds that requiring a female student to shake out her bra without removing her top is unconstitutional. There is not one prior case which holds that when items are stolen in a closed classroom full of students, during the class, and none

of those students has left, it is unconstitutional to reasonably suspect and search each student. The alleged unlawfulness of the search in the case herein was anything but "apparent" based upon the *Beard* case, *supra*, or any prior case.

This Court's decisions in *Earls* and *Vernonia* involved random drug testing of athletes. The Sixth Circuit has now expanded the term "individualized suspicion" into an edict that has never been expressed by this Court. Clarification is desperately needed. Petitioners could not possibly have been on fair notice that their search was going to be unconstitutional, either in inception or scope. Petitioners are entitled to qualified immunity.

4. Whether the Sixth Circuit's decision conflicts with decisions of the Seventh, Ninth, and Eleventh Circuits regarding the reasonableness of the inception and scope of the search, and the application of established principles of qualified immunity.

Herein, the Sixth Circuit held that the scope of the search was unconstitutional. At page 6 of the Knisley I decision, reprinted verbatim in Knisley II, the Court stated that the scope of the searches was not reasonable, the searches were highly intrusive, and were undertaken to find monetary items. It is submitted that finding is in conflict with decisions of the Seventh and Eleventh Circuits, and until the *Redding* case, supra, was reversed *en banc*, was in conflict with the Ninth Circuit. It is undisputed herein that seventeen (17) female nursing students were searched separately in the bathroom, by a female

school nurse, who asked them to unsnap their bra and shake it out under their scrub top, without removing their top, and to pull their scrub pants down to their thigh or knee level so that she could see if the stolen items were hidden in their underwear.[3]

In the case of *Cornfield v. Consolidated High School*, 991 F.2d 1316, (7th Cir. 1993), the court upheld the search of a student's nude body for drugs. School officials had received several tips and were aware of past activities of a student related to drugs. He was observed with an unusual bulge in his crotch area. Believing the sixteen (16) year old to be "crotching" drugs, his mother was contacted to seek consent for the search and she refused. Nonetheless, school officials took him to the boy's locker room, had him remove his street clothes and put on a gym uniform while they searched his clothes. They visually inspected his naked body and physically inspected his clothes and found no evidence of drugs or any contraband. A body cavity search was not performed. The court acknowledged that a nude search of a student is traumatic but found that school officials had enough independent factors to support the reasonableness of their suspicion of drug possession. He had a history of dealing drugs, did not successfully complete a drug rehab program, had been found in possession of a live bullet previously, had been reported to smell like marijuana, and information was obtained that he was selling marijuana to other

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[3] It should be noted that Respondents admitted they had absolutely no problem with the search of their purses, pockets, shoes, socks, books, lockers, or any other part of the search except the search in the bathroom with Ms. Fout.

students. The court found that even if this information turned out to be later untrue, it was sufficient to have created a reasonable suspicion for the search. With regard to the scope of the search, the court found it was reasonable as it was done in the privacy of the boy's locker room, he was not physically touched or subjected to a body cavity search, and was allowed to put on a gym uniform while his clothes were closely inspected. Even though no drugs were found, the court found that the search was reasonable in scope.

In the case of *Jenkins v. Talladega City Board of Education*, 115 F.3d 821, (11th Cir. 1997), the court granted immunity to defendants after two (2) female second (2nd) graders were strip searched, twice, by female teachers searching for $7.00 in stolen money. The court found that at the time the events took place, the law pertaining to the search of students had not been developed in a concrete factually similar context to place defendants on notice that their conduct was constitutionally impermissible. On the date in question, one student informed the teacher that $7.00 was missing from her purse. Two (2) students were implicated by other students, and they were questioned and then mutually accused each other. Their backpacks were searched as well as their socks and shoes. The money was not found. The girls were taken in the restroom and told to remove their clothes and come out with their underpants down to their ankles and did so. The money was not found. One of them said the money was hidden behind a file cabinet, but it was not. They were escorted to the restroom a second time and removed their clothes in an effort to locate the money, which was not found. In addition to granting immunity, the court found that the searches

were reasonably related to the objective of uncovering the stolen $7.00. The court stated that the stealing of $7.00 in an elementary classroom should be considered by school officials to be a matter of serious concern. The searches were not excessively intrusive because the search was conducted by female teachers and the students were eight (8) years old, thus pre-pubescent. It is common experience that teachers frequently assist students of that age in the bathroom.

In *Redding v. Safford Unified School Dist., et al.*, 504 F.3d 828 (9th Cir.), *on rehearing en banc*, *Redding v. Safford Unified School Dist. No. 1, et al.*, 531 F.3d 1071 (9th Cir. 2008), before it was reversed on rehearing *en banc*, the Ninth Circuit held that the search of a student suspected of possessing and distributing prescription pills was reasonable in scope. Ms. Redding was taken into the nurse's office and removed her jacket, shoes, and socks, removed her pants and shirt, pulled her bra out and to the side and shook it, exposing her breast, and pulled her underwear out at the crotch and shook it, exposing her pelvis area. Immediately after it was concluded, her clothes were returned and she was allowed to get dressed. She was not touched at any point during the search.

Clearly, when comparing scope of the searches in *Cornfield*, *Jenkins* and *Redding*, they are far more egregious than the search herein. *Cornfield* involved the search of a sixteen (16) year old student's nude body, *Jenkins* involved the nude search of two (2) female second graders regarding a $7.00 theft, and *Redding* involved the search of a thirteen (13) year old female requiring the removal of her pants and shirt, pulling out her bra and exposing her breasts and pelvic

area. Nonetheless, these searches were all considered reasonable in scope.

Herein, the Sixth Circuit has declared the shaking out of bras under scrub tops, and the pulling down of scrub bottoms to the knees as "highly intrusive," and unreasonable. As such, with regard to the scope of the search, there is clear conflict between the Sixth, Seventh, and Eleventh Districts, and prior to its *en banc* reversal of *Redding*, the Ninth Circuit.

It has become patently obvious that clarification and guidance is desperately needed with regard to the scope of school searches. The Circuits do not agree, and recently with the Ninth Circuit in *Redding*, all of the Judges within the Ninth Circuit did not agree. This Court has already held that "If Judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603 (1999). Where two (2) government officials of reasonable competence could disagree on the lawfulness of an action, immunity must be recognized. *Malley v. Briggs*, 475 U.S. 335 (1986). This holding was re-enforced by this Court in *Safford*, supra. The same analysis should apply to school officials, especially in light of the requirement that Courts give deference to the educators who administer this nation's schools.

CONCLUSION

For the foregoing reasons, the Court is respectfully urged to grant this Petition for Writ of Certiorari, again vacate the decision of the Sixth Circuit, rectify the erroneous test of "individualized suspicion" and hold that Petitioners herein are entitled to qualified immunity.

Respectfully Submitted,

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